MEMORANDUM

To: Public Utility Commission
From: D.J. Powers, Attorney for the Center For Economic Justice
Re: **Denial Of Basic Telephone Service For Nonpayment Of Long Distance Charges**

Question Presented

Under PURA[1] § 3.258(a), a telecommunications utility must provide basic local telephone service to all customers within its certified area, except as provided by statute. PURA §3.258(b)(1) permits discontinuation of service for nonpayment of "charges." The PUC promulgated rules that permit a telecommunications utility to deny service for nonpayment of charges for service other than basic local telephone service. Did the PUC have the authority to promulgate these rules?

Brief Answer

No. Administrative agencies may not promulgate rules which conflict with a statute. Under standard rules of statutory construction, the only "charges" for which nonpayment justifies disconnection are charges for basic local telephone service. In addition, the rules are defective because they authorize violations of the Texas Debt Collection Act.

Discussion

I. Background

A. Basic local service v. long distance service

Local exchange companies (LECs) sell basic local telecommunications service;[2] interexchange companies (IXCs) sell long distance service. Basic local telecommunications service (basic service) does not include long distance services.[3] But most LECs provide billing and collection services for IXCs. Thus, the LEC's bill to the customer may include long distance charges, even though the LEC is not providing that service.

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1 Public Utility Regulatory Act of 1995, Tex. Rev. Civ. Stat. Ann. art. 1446-O, hereinafter PURA.

2 PURA § 3.002 (6).

3 PURA § 3.002 (1) (defining "basic local telecommunications service").

B. The duty to serve

A telecommunications utility is required to provide basic service to any customer within its certified area unless an express statutory exception exists. PURA §3.258 (a). This provision is commonly referred to as "the duty to serve." The only statutory exceptions are provided in §3.258 (b), §3.259, and §3.2595. When specific exclusions or exceptions to a statute are stated by the legislature, no other exclusions or exceptions shall apply.[4] Thus, LECs are not excused from their duty to serve unless one of these three statutes permits them to disconnect service for failure to pay long distance charges.

The exceptions in §3.259 and §3.2595 are not applicable. Section 3.259 concerns a refusal to serve if prohibited under unrelated provisions of the Local Government Code (concerning utility service to certain areas). Section 3.2959 concerns discontinuation of service to an entire area, not an individual consumer.

Two arguments can be made that the §3.258 (b) exception for "nonpayment of charges" permits disconnection for failure to pay a long distance bill. First, it could be argued under subsection (b)(1) that the exception for "nonpayment of charges" applies to local *and* long distance charges, rather than just charges for basic local service. Second, it could be argued under subsection (b)(3) that the failure to pay a long distance bill is a "similar reason" to those listed. The balance of this memo will show that both of these arguments fail.

C. Current PUC rules

Several PUC rules permit denial of service for nonpayment of long distance charges. See, e.g., 16 TAC §§ 23.43 and 23.46. These deposit and disconnection rules all include "the charges of interexchange carriers only where a local exchange carrier's tariffs provide for billing for the interexchange carrier." Thus, the rules permit discontinuation of service for long distance charges by some, but not all, LECs and when the consumer owes a debt to some, but not all, IXCs. Thus, the PUC's definition of "charges" varies depending on facts that are completely outside the control of the consumer.

D. An administrative rule that conflicts with a statute is void

Administrative agencies are creatures of statute, have no inherent authority, and may exercise only those specific powers conferred upon them by law in clear and express language; no additional authority will be implied by judicial construction.[5] The key factor in determining whether an agency had statutory authority to promulgate a rule is whether the rule's provisions are in harmony with the general objectives of the Act involved.[6]

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[4] *Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303, 308 (Tex. 1978); *Public Utility Commission v. Cofer*, 754 S.W.2d 121,124 (Tex. 1988).

[5] *State v. Public Utility Com'n of Texas*, 883 S.W.2d 190, 194 (Tex. 1994); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129 (Tex. App. - Austin 1986, writ ref'd n.r.e.).

[6] *Edgewood Independent School Dist. v. Meno*, 917 S.W.2d 717, 750 (Tex. 1995); *Gerst v. Oak Cliff Sav. and Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968).

Although an agency's interpretation of a statute is given weight by the courts, actions by the agency must be consistent with, and in furtherance of, expressed statutory purposes. If the agency takes an action which conflicts with the statute, the agency's action is ineffective.[7]

Thus, the PUC is without power to permit LECs to deny service for failure to pay a long distance bill if that practice is inconsistent with a statute. As the next section will show, that practice is inconsistent both with PURA and the Texas Debt Collection Act.

II. The Disconnection Rules Are Inconsistent With Texas Statutes

Rules that permit an LEC to deny service for nonpayment of long distance charges violate two state statutes: PURA and the Texas Debt Collection Act.[8]

A. PURA prohibits LECs from denying service for nonpayment of long distance charges

The LEC's right to disconnect service for nonpayment of long distance charges depends on the meaning of "charges" in §3.258 (b)(1). That section provides an exception to the duty to serve for "nonpayment of charges." "Charges" means either charges for basic local telephone service only or charges for basic *and* long distance telephone services. This section will show that the only reasonable interpretation of "charges" is to apply solely to charges for basic local telephone service.

1. The only reasonable interpretation of "charges" is to apply solely to charges for basic local telephone service

Three rules of statutory construction are particularly applicable to the interpretation of "charges" in §3.258 (b).

First, the term "charges" must be interpreted based on a reading of the statute as a whole, not just its isolated use in §3.258 (b)(1). As the Texas supreme court has recognized, courts must not restrict themselves to the single phrase or sentence in which a term is used when attempting to ascertain its meaning.[9] Stated another way, the intent of a law "should not look alone to any one phrase, clause or sentence," but to the entire body of laws governing the same subject.[10]

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7 *National County Mut. Fire Ins. Co. v. Johnson*, 879 S.W.2d 1, 3 (Tex. 1993).

8 Tex. Rev. Civ. Stat. Ann. art. 5069-11.01 *et seq.*

9 *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995).

10 *Ex Parte Roloff*, 510 S.W.2d 913, 915 (Tex. 1974).

Second, the interpretation must be consistent with the legislature's intent to encourage universal service. The cardinal rule of construction is to give effect to the legislative intent.[11] That intent must be determined from the statute as a whole, not simply from isolated parts.[12] In this case, the legislature expressly set out its policy of "guaranteeing the affordability of basic telephone service" in Texas.[13] This legislative intent is also referred to as the universal service goal.

Third, a statute is not ambiguous unless there is more than one *reasonable* interpretation of the statute. Before a court concludes that a law is ambiguous, it must first consider alternative constructions truly just and reasonable. Only more than one reasonable construction produces ambiguity.[14]

The following sections apply these rules of construction to §3.258.

a. §3.258(b)(1) does not include long distance charges

The first statutory construction rule requires us to look beyond the term "nonpayment of charges" in §3.258(b)(1). Taken alone, this phrase would mean that nonpayment of *any* charge by *any* provider of goods or services would permit the LEC to disconnect service. For instance, failure to pay a disputed charge on a department store credit card could be grounds for disconnection of telephone service. Clearly the legislature intended to limit the types of charges for which nonpayment entitles the LEC to discontinue service. The first statutory construction rule set out above supports this intent by requiring a reading of the statute as a whole, not just the isolated phrase "nonpayment of charges."

The issue, then, is how the legislature limited the types of charges for which service disconnection is permitted. There are two possible interpretations. Section 3.258 could limit "charges" to either (1) charges for basic local telephone service or (2) charges for local *and* long distance telephone services.

The only type of good or service mentioned in §3.258 is basic local telephone service. Subsection (a) expressly makes the statute applicable to "basic local telecommunications service." Nowhere in the statute is there a direct or indirect reference to billing and collection service or long distance service. Moreover, §3.258(b)(2) confirms that the exceptions in §3.258(b) relate only to basic local telephone service. That provision provides that the LEC may discontinue service for "nonuse." Obviously this means nonuse *of basic local telephone service*. It would be absurd to interpret this section to permit a LEC to discontinue basic service for nonuse of another service, such as long distance service.

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[11] Texas Gov't Code Ann. § 312.005; *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994); *Bridgestone/Firestone, Inc., v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994); *Monsanto v. Cornerstones Municipal Utility District*, 865 S.W.2d 937, 939 (Tex. 1993).

[12] *Bridgestone/Firestone, Inc., v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985); *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984).

[13] PURA § 3.001.

[14] *Towers of Texas, Inc. v. J&J Systems, Inc.*, 834 S.W.2d 1, 2 (Tex. 1992).

There is no doubt that the legislature intended to limit the type of service for which nonpayment of charges or nonuse would justify refusal of service. The only type of service mentioned in §3.258 is basic local telephone service. Therefore, the legislature intended to limit the "charges" for which disconnection is permitted to charges for basic local telephone service.

b. §3.258(b)(3) does not include long distance charges

The legislature's intent to limit the exception to nonpayment of charges for basic local telephone service should not be disregarded through an expanded reading of §3.258(b)(3). That section provides an exception to the duty to serve for "other similar reasons." This exception does not include nonpayment of charges for other services. When general words like "other similar reasons" follow an enumeration of persons or things, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class of those specifically mentioned.[15] As shown above, the class of things provided in §3.258(b)(1) and (b)(2) are things related to basic local telephone service.

Thus, the general words "other similar reasons" apply only to matters concerning basic local telephone service. This exception does not permit disconnection of basic local telephone service for nonpayment of charges for any service other than basic local telephone service.

2. Application of specific rules of statutory construction aids do not permit a contrary reading

As the discussion above shows, there is only one reasonable reading of the exceptions to the duty to serve: "nonpayment of charges" means nonpayment of charges for basic local telephone service. The statute is not ambiguous because there is only one reasonable interpretation.[16] Thus, there is no need to resort to statutory construction aids.[17] However, in this section three such aids will be discussed in detail regarding their application to the exception to the duty to serve.

a. Any ambiguity should be resolved in favor of service

Although the exception is not ambiguous, any ambiguity should be resolved in favor of providing service. It is well-settled in insurance law that ambiguous statutes are always interpreted in favor of consumers. If there are two competing reasonable constructions of an insurance statute, one favoring the insurance companies, and one favoring the insureds, then the ambiguity is resolved in favor

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[15] *Central Power & Light Co. v. Bradbury*, 871 S.W.2d 860, 863 (Tex. App. - Corpus Christi 1994, writ denied); *Carbide International Ltd. V. State*, 695 S.W.2d 653, 658 (Tex. App. - Austin 1985, no writ); *Watkins v. Certain Feed Products Corp.*, 231 S.W.2d 981, 984 (Tex. Civ. App. - Amarillo 1950, writ).

[16] *Towers of Texas, Inc. v. J&J Systems, Inc.*, 834 S.W.2d 1, 2 (Tex. 1992)

[17] *Simms v. The Adoption Alliance*, 922 S.W.2d 213, 215 (Tex. App.--San Antonio 1996, writ denied); *Texas Water Comm'n v. Brushy Creek M.U.D.*, 917 S.W.2d 19, 21 (Tex. 1996); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994); *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994); *Monsanto Co. v. Cornerstones M.U.D.*, 865 S.W.2d 937, 939 (Tex. 1993); *One 1985 Chevrolet v. State*, 852 S.W.2d 932, 935 (Tex. 1993); *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983); *Boykin v. State*, 818 S.W.2d 782, 785-86, 790 n.4 (Tex. Cr. App. 1991).

of the public and the insureds.[18] This developed rule is a reasonable corollary to the Code Construction Act requirement that laws yield a "just and reasonable result" by which the "public interest is favored over any private interest."[19]

This rule of law is equally, if not more, applicable to the provision of a basic necessity like local telephone service. When there are two competing reasonable constructions of a section of PURA, one favoring the utility in its attempts to avoid its duty to serve and one favoring the public and the goal of universal service, the ambiguity should be resolved in favor of requiring the utility to provide service. This will further the legislature's goal of "guaranteeing the affordability of basic telephone service" in Texas.[20]

b. The PUC's erroneous interpretation of "charges" is not controlling

Although courts sometimes give deference to an agency's interpretation of its own statute, that doctrine does not apply in this case.

First, agency deference is simply a statutory construction aid and does not apply when the statute is unambiguous. The courts will not even consider the agency's interpretation if the statute is unambiguous:

> Thus, before giving weight to the Commissioner's interpretation of the phrase before us, we must conclude that the phrase is ambiguous.[21]

The courts have not been hesitant to disregard the PUC's interpretations of telephone statutes in the past:

> [T]he Commission asserts in the alternative that … we should defer to the Commission's interpretation. [citation omitted] However, such deference is permissible only if the meaning of the statutory language is unclear or ambiguous. [citation omitted] We conclude that PURA Sec. 3(c)(2)(B) is not ambiguous in any material respect and that the Commission's interpretation conflicts with the plain meaning of the provision. Accordingly, we decline to defer to the Commission's interpretation.[22]

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[18] *Cf. State Farm v. Beaston,* 907 S.W.2d at 433 (if an insurance policy remains ambiguous despite application of the canons of interpretation courts must construe its language against the insurer in a manner that favors coverage); *see also National Union Fire Ins. Co. v. Hudson Energy Co.,* 811 S.W.2d 552, 555 (Tex.1991); *Blaylock v. American Guar. Bank Liab. Ins. Co.,* 632 S.W.2d 719, 721 (Tex.1982); *Ramsay v. Maryland Am. Gen. Ins. Co.,* 533 S.W.2d 344, 349 (Tex.1976).

[19] Texas Gov't Code Ann. § 311.021.

[20] See PURA § 3.001.

[21] *Meno v. Kitchens,* 873 S.W.2d 789, 792 (Tex. App.-Austin 1994, writ denied).

[22] *Southwestern Bell Telephone Co. v. Public Utility Com'n of Texas,* 888 S.W.2d 921, 927 (Tex. App.-Austin 1994, no writ).

Since §3.258(b) is not ambiguous, the PUC's interpretation of "charges" is not entitled to any weight.

Second, an agency's interpretation will not be followed if it conflicts with the statute. The interpretation is valid only if it is consistent with the statutory definition and the interpretation may not expand the language of the statute.[23] Courts will reject the erroneous interpretation even if it has been applied for a long time:

> Although courts in construing a statute may consider the administrative construction which has been placed on it, … they cannot allow an administrative construction, however long applied, to control over the clear and express provisions of the statute, or to arrogate to the agency express powers which the statute clearly does not grant, and in fact impliedly withholds.[24]

The PUC's past interpretation of "charges" to include long distance charges violates the only reasonable interpretation of the statute. Thus, the PUC's interpretation is not entitled to any deference.

Third, even if the courts do give deference to the PUC's interpretation of "charges," the courts are not bound by the interpretation.[25] Interpretation of a statute, of course, is a question of law and courts are well-suited to determine questions of law on their own. Court's are particularly adverse to being bound by erroneous interpretations:

> [A]n administrative agency's interpretation of a statute is never absolutely binding on this Court, *Bullock v. Ramada Tex., Inc*., 609 S.W.2d 537, 539 (Tex.1980), and will not be followed "when contrary to the intention of the Legislature as disclosed by the provisions of the act."[26]

Even if the courts do give deference to the PUC's interpretation of "charges," therefore, the courts will not be bound by the interpretation. Moreover, they will reject it as being contrary to the legislative intent.

Finally, the PUC's interpretation of "charges" is not entitled to any weight because it is unreasonable. Rather than define "charges" as including long distance charges, the PUC rules interpret "charges" to include only long distance charges for which the LEC provides billing and collection services. Thus, "charges" is defined to have one meaning for LECs that provide billing and collection services (i.e. "charges" means local and long distance charges) but a different meaning for other LECs (i.e. "charges" means only local service). Moreover, even for LECs that

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[23] *Firestone Tire and Rubber Co. v. Bullock*, 573 S.W.2d 498, 502, n. 3 (Tex. 1978).

[24] *Denton County Elec. Co-op., Inc. v. Public Utility Com'n of Texas*, 818 S.W.2d 490, 493 (Tex. App.-Texarkana 1991, writ denied).

[25] *Bullock v. Ramada Texas, Inc.*, 609 S.W.2d 537, 539 (Tex. 1980).

[26] *Calhoun County Independent School Dist. v. Meno*, 902 S.W.2d 748, 752 (Tex. App.-Austin 1995, writ denied).

provide billing and collection services, "charges" includes long distance charges only by some IXCs, namely, those for whom the LEC provides the billing and collection services.

This fluid definition of "charges" is neither reasonable nor justified by the statute. Charges for long distance service are either "charges" as contemplated by the statute or they are not. Nothing in the statute supports an interpretation that would have the term have a different meaning depending on whether or not an IXC carrier happens to have entered a billing and collection services agreement with the LEC. The PUC's interpretation is not reasonable and should be rejected.

c. The recodification of PURA did not constitute an approval of the PUC's interpretation

For the same reasons that the PUC's interpretation of the statute is not entitled to any weight by the courts, the recodification of PURA did not amount to a legislative acceptance of this erroneous interpretation. Most importantly, the doctrine of legislative acceptance applies only when the statute to be construed is ambiguous.[27] Since §3.258(b) is not ambiguous, the legislature did not accept the PUC's erroneous interpretation of the statute when it recodified PURA.

B. Texas Debt Collection Practices Act

Substantive Rule § 23.45(c)(4) permits the LEC to charge a 5% late charge on the entire deferred payment balance in violation of Texas Debt Collection Act §11.04 (b). That statute prohibits a debt collector from:

> collecting or attempting to collect any interest or other charge, fee, or expense incidental to the obligation unless such interest or incidental fee, charge, or expenses is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer.

The late charge on the LEC services is authorized, but the late charge on the portion of the balance for long distance services is not. Unless the IXC has entered a written contract permitting it to charge the late fee, it has no right to do so through its bill collector, the LEC. The rule does not make the late charge "legally chargeable" because the PUC has no authority to regulate the charges of long distance carriers.[28] Thus, no statute, rule or contract permits a late fee on the long distance portion of the balance. Any efforts to attempt to collect this unauthorized fee would violate the Texas Debt Collection Act.

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[27] *Sharp v. House of Lloyd*, 815 S.W.2d 245, 248 (Tex. 1991).

[28] PURA §3.051(c).